Committee on Resources
Subcommittee on National Parks and Public Lands

Testimony

Testimony

of

David Brown

Executive Director

AMERICA OUTDOORS

on

Oversight on Implementation of the

National Park Service

Concessions Management Improvement Act of 1998

Before the

Subcommittee on National Parks and Public Lands

Committee on Resources

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Testimony of Mr. David Brown, Executive Director, America Outdoors:

Chairman Hansen and members of the subcommittee, I appreciate the opportunity to testify today about proposed rules and the simplified contract form that represent implementation of the National Park Service Concessions Management Improvement Act of 1998 as it pertains to outfitters and guides.

My name is David L. Brown, and I am Executive Director of America Outdoors, headquartered in Knoxville, TN.

America Outdoors is a national association of professional outfitters, guides and their suppliers. Our members serve more than 2 million Americans each year in more than 43 states, including many units of the

National Park System. Together with our network of state and regional affiliate organizations, America Outdoors represents over 600 members directly and the interests of more than 1,000 affiliated outfitter and guide companies.

As you know, Mr. Chairman, outfitters and guides supported the 1998 Act. This Congress sought a balance between the management responsibilities of the National Park Service and the business needs of concessioners from the private sector, people who enjoy both a privilege and an opportunity in providing services to park visitors. When Congress faced tough decisions about the details of concessions reform, you and others provided the leadership necessary to stay focused on the public's need for reliable, quality services. You made the needs and desires of park visitors as equal as possible to the agency's primary obligation to protect park resources.

In this legislative process, outfitter and guide operations originating outside park boundaries were recognized as having different needs than concessioners providing real estate-based hospitality services inside park boundaries. In that same vein, other small businesses located within the parks were similarly recognized. This distinction can be found in a number of provisions of the 1998 Act, but is most importantly summarized by the right of preference on renewal, assuming good performance, and a simplified form of the concessioner contract. And for outfitters and guides, Congress provided standardized fees for those who compete head-to-head to provide similar services on the same stretch of river or land area within a park unit.

Other terms and conditions contained in the 1998 Act were arguably difficult for outfitters to support, as measured by standard business practices in the private sector, but outfitters and guides recognized that the privilege of operating within the park system is necessarily accompanied by unique obligations to both the public and the landscape. Overall, for outfitters and guides and other small business, the 1998 Act balanced the requirements of this unique business climate with a commendable level of trust in outfitters and the owners of small businesses.

The balance this subcommittee achieved, Mr. Chairman, is certainly not reflected in the National Park Service's effort to implement the new concessions policy law. The agency has chosen instead to implement the Act in a manner that is hostile to concessioners, large and small. Implementation appears to be especially hostile toward outfitters and guides and the owners of small businesses. This is probably explained by opposition within NPS in 1998 to any extension of the right of preference in renewal.

In reading the agency's rulemaking alongside the Act, members of this subcommittee will draw the same conclusion that outfitters have drawn: many actions of the National Park Service in implementing the 1998 Act are contrary to the intent of Congress and to the Act itself.

My testimony will focus on several specific instances in which NPS has violated the intent of Congress and the Act, but first I want to mention briefly that the hostility toward outfitters expressed by the rulemaking stands in sharp contrast to outfitter relations with NPS field staff.

Outfitters, for the most part, have an excellent relationship with their local NPS permit administrators as well as with their local NPS rangers. Park superintendents, concessions managers and these rangers are more savvy and even-handed in managing concessioners than the NPS rulemaking would suggest. Here, trust has been earned, and outfitters and permit administrators operate in a climate of mutual respect.

Such a relationship makes good business sense. It serves the public well. It results in quality visitor services,

returns fair fees, and achieves a high level of protection of park resources, as the 1998 Act prescribes--consideration for biological, historical, cultural, recreational AND revenue values. With admirably few exceptions, the local relationship between outfitters and NPS managers conforms to the spirit and rule of the 1998 Act.

What emerged from NPS headquarters in Washington in this rulemaking is inexplicably hostile. Since outfitters do not experience this lack of trust and good faith in the field, they naturally assume that the antipathy exists among a handful of people in the Washington office of the National Park Service, who had the greatest influence and control over the details in this rulemaking. My members are not presently enjoying a high level of confidence in their government and in the partnership they entered into in deciding to pursue professional careers as park concessioners.

I think the situation can be remedied. AO has been reassured that our comments and comments offered by individual outfitters are being taken to heart, and we have hopes of eventually seeing a Final Rule that is vastly improved. Otherwise, I'm afraid I can safely predict that fewer and fewer responsible, dedicated people will opt to take the risk of operating in park settings. The Proposed Rule defeats the purpose of the Act, which is to attract skilled, experienced people to these jobs and assure that NPS staff will responsibly regulate concessioner activities. Park operations will be crippled if private sector investors are no longer willing to assume the financial risk in offering visitor services to the public.

Let me point to a recent exchange of correspondence that illustrates my point. NPS is requiring an annual certified audit for all NPS concessions that gross over $1,000,000 per permit, accompanied by a letter from the outfitter's CPA. There are, in fact, few million-plus outfitters in the system, but I received this note from one:

"These required certified audits for what are now small concessions are expensive, time consuming and unnecessary. Our audit, before all is said and done, will cost somewhere between $10,000 and $15,000. This may not sound like much for a business that grosses $1,000,000, but we are already paying 4 to 6% of our gross to the NPS, and since they control what we charge in order to keep our Net down, this does not give us a great deal of leeway. On top of this we still pay Income Tax, and our new contract requires us to re-invest $650,000 in new structures over a ten-year period. The Park Service also requires us to pay for all these little studies, such as asbestos studies, Y2K compliance, OSHA Prelims, etc. All these things add up. I can see having a certified audit half way through a contract, but every year?"

AO's primary concerns about the Proposed Rule are attached, contained in a letter directed on our behalf to the National Park Service by AO's counsel at Holland & Hart. As you know, NPS chose to fragment the rulemaking into several parts, and AO has responded to each. Other key features of the new law have not been implemented by NPS, yet these are elements of concession policy that are essential to outfitter operations.

NPS did not release the proposed text of the simplified concessions contract until well after the close of the comment period on the Proposed Rule. Had outfitters been given the opportunity to compare the Proposed Rule to the text of the contract that expresses these terms and conditions, our initial comments from Holland & Hart would have been significantly different.

In view of this fragmentation and lack of completion of the rulemaking, we have asked that NPS republish a full Proposed Rule for additional public comment. We understand, Chairman Hansen, you have also made such a request, and we thank you for doing so.

Let me first address aspects of the 1998 law that the National Park Service has failed to implement:

Commercial Use Authorizations The rulemaking failed to address section 418 of the Act, providing authority for Commercial Use Authorizations. Over 3,000 operations are currently managed under the authority of incidental business permits, including a significant segment of guided activities. The National Outdoor Leadership School in Lander, WY, and the Outward Bound system of schools, for example, are two wilderness educators that depend heavily on this form of permit. Wilderness Inquiry in Minnesota, the pioneer in creating wilderness techniques and opportunities for universal access for people with disabilities, is another company that depends heavily upon the CUA in order to provide a wide range of outdoor settings requiring differing levels of skills for access and enjoyment.

Tied to the CUA authority in section 418 is an exemption for non-profit organizations from the requirement for a full outfitter and guide contract or a Commercial Use Authorization for group trips. This exemption opens the national parks to a floodgate of uncontrolled access by groups with no established itinerary, and who pay no fees in many instances, though many of these trips are commercial in nature and compete directly with fully commercial outfitters and guide operations. Park managers and the concessioners need to know how NPS intends to plan for and administer groups operating under this exemption, but the Proposed Rule is silent.

Outward Bound, NOLS, Wilderness Inquiry, and many other outfitters do not know what to expect. Many are uncertain whether the activities offered, or the frequency of those activities, will be conducted under a full outfitter contract or under the authority of the CUA. They are unable to plan for the future because NPS has not fully implemented the CUA, a key feature of the new law. Indeed, NOLS and Outward Bound are now being told by some park units that their operations are no longer required to obtain permits or outfitter and guide contracts.

I assume that Mr. Mackey will address this unusual situation on behalf of Outward Bound and other wilderness educators, but I would like to add that I applaud Outward Bound for the position they have taken. Their position is that Outward Bound is a wilderness educator that has chosen to operate as an outfitter and guide, using parks, forests and other outdoor settings as their classrooms. Outward Bound feels it would be irresponsible to operate in this manner without permits, without itineraries, and without payment of fees, even though the exemption in the 1998 Act provides the opportunity of unlimited, unrestrained access to national parks.

Before continuing with a summary of other problems in the Proposed Rule, Mr. Chairman, I would like to request that this subcommittee consider repealing the exemption that allows non-profit group trips to be conducted without a permit. The exemption makes a mockery of efforts by park managers to determine and control carrying capacity. When these trips are also commercial in nature, as they often are, the exemption sets a double standard for the fundamental obligation to the public to provide trained guides, state-of-the-art equipment, safety and rescue procedures, insurance, indemnity, fees and other hallmarks of professional guiding.

Frankly, this exemption reflects badly on those who sought it, and it's a very bad message to those to participate in non-profit-sponsored expeditions. Group trip leaders, whether noncommercial or commercial, should be willing partners in the effort to manage within carrying capacity restrictions, and itineraries are an essential element for managing use within the zone of tolerance measured by such restrictions. I believe it is also disingenuous to create an exemption to avoid paying franchise or user fees, such as are paid by

members of the commercially outfitted public.

Reasonableness of Rates Congress intends that the new Concessions Advisory Board recommend procedures with respect to ratemaking, including changes in existing rates. That Board met for the first time in the second week of November 1999, but it will likely be several months before NPS receives substantive recommendations from the Board. In the meantime, the proposed rule fails to provide an interim procedure for determining reasonable rates, placing concessioners in gridlock for the coming season and stifling any efforts to conduct long range business planning.

Contracting for Services Section 410 of the Act directs the agency to contract with private entities to conduct a number of services related to management and review of concession operations. Concessioners are concerned about cost recovery requirements resulting from these additional services, costs that would inevitably be outside the scope of existing contracts. The Proposed Rule is silent, providing none of the guidance or information needed by concessioners and by NPS concessions staff in the field.

Let me also address key issues in which AO believes implementation of the Act violates congressional intent and the statute:

Fee Bidding Encouragement of fee bidding in proposed rule 51.21 and related rules violates the statute's clear language that subordinates the fee to the objectives of "protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates." The rule is elaborate in its construction of a selection process that inevitably drives the identification of a "best proposal" toward a decision based on fee bidding. Greater weight is given to a higher franchise fee by arbitrarily assigning superior status to the fee as a form of "environmental protection" providing "substantially greater benefits for the preservation of the resources of the park areas." This is not what Congress intended.

Preference in Renewal for Outfitters and Guides and Other Small Businesses No meaningful preference in renewal for outfitters and guides and other small businesses has survived proposed rulemaking. The proposed rule dwells on opportunities to remove preference. The Secretary may split, or combine, existing concessions contracts, causing the current outfitter or business owner to lose the right of preference. An outfitter that "provided visitor services beyond the scope of the outfitter and guide services authorized" is not qualified for preference. The Secretary may also significantly alter the authorized activity during the term of the contract, causing the outfitter or business owner to be ineligible for a right of preference at renewal. (Proposed rules 51.33, 51.37, 51.38, 512.84)

NPS has created an additional complication for outfitters and small business owners who 1) are found to be qualified to perform the terms and conditions of the prospectus; 2) have made a responsive offer; and 3) have earned the right of preference through satisfactory performance of the previous contract. Under the Proposed Rule, when a superior competing offer is identified, the Secretary must then make a second finding that the incumbent outfitter or small business owner with preference is additionally "qualified" to match terms, conditions or qualifications offered by the competitor. It was not intended by the Act that the right of preference be so encumbered, specifically that the competitor's offer be leveraged to create wholly new prospectus criteria.

Encumbrances Proposed rules 51.94, 51.95 and 51.96 establish that any financial encumbrance of a concession contract requires the prior written approval of the Director of the NPS. As such, these rules intrude into day-to-day business operations in ways unheard of in modern business practices and certainly

not envisioned by the Act. Taken to the furthest extreme, a concessioner will be unable to exercise a line of credit for purchasing equipment or conducting other day-to-day operations without the express, prior approval of the agency.

"Simplified Procedures" For Small Concessions Contracts Attached to my testimony is my letter of January 14, 2000, commenting on the proposed simplified standard concession contract. The terms of the contract do nothing to acknowledge or clarify the right of preference provided by law to outfitters and guides and to small businesses. The contract requires that outfitters pay fees based upon all revenue, including revenue generated from non-park operations. The contract unreasonably specifies that all personal property of the concessioner is subject to a lien held by the federal government, while we feel that only property used in the performance of the contract should be at risk. There are other bad features of the simplified contract, not the least of which is that the "simplified" contract is now twice as long as the outfitter and guide contract currently in use at most park units.

One feature of the contract is remarkable and entirely contrary to the 1998 Act. The proposed contract is simply not a contract. It states (and therefore the outfitter must sign and stipulate) that the so-called contract may be unilaterally suspended or terminated by NPS when "necessary for administrative purposes." This is an extraordinary departure from sound business practice, from law, and from any sense of partnership in serving the public.

Mr. Chairman, further evidence of this bias toward commercial services occurs elsewhere in park operations. NPS contracted recently with The Social Research Laboratory at Northern Arizona University to conduct a comprehensive survey of the opinions of the American public toward park services. People throughout the country were asked.

One series of questions was designed to gain an understanding of patterns of usage by National Park System visitors. This information will allow NPS personnel to "better understand what visitors are interested in doing when they visit NPS units."

A series of eight questions in one section gathered information about whether the visitor had camped at an NPS campground or taken an overnight backpacking trip. Visitors were questioned about whether their time was spent sightseeing, day hiking or picnicking, and whether they had attended a cultural demonstration or performance. Visitors were asked whether they had taken a ranger-led interpretive historical tour, and among the eight questions in this unit, visitors were also asked whether they had taken a ranger-led interpretive nature tour.

Those surveyed were not asked whether they had utilized the services of an outfitter and guide, rather than a ranger. They were not asked about their need or desire for a broad range of commercial services. Any insight into the role concessioners might have played in the visitors' enjoyment of park resources must be derived in this survey from the one relevant question that was asked. Visitors were asked to break down the amount of money spent on food, lodging, transportation and souvenirs--services likely provided by a concessioner, but NPS was obviously not interested

Requests for outfitter permits are frequently denied because, according to some local NPS managers, the public "has not expressed a need for outfitter services." We begin to see that the National Park Service is careful not to ask the public about their needs and preferences where concessioner-provided services are concerned.

And sadly, from my initial reading of changes proposed in the system-wide revision of NPS management policies, this policy of "non-use" for park visitors seeking recreation is being pursued aggressively. AO will share its comments on that rulemaking with you at the appropriate time, Mr. Chairman. If any single group of people in this country is gifted with a unique opportunity to use and enjoy park resources, it is the people of Utah. We trust that you will put the train back on the tracks.

I also have confidence that several key people in NPS policy roles understand the implications of this fragmented rulemaking process as well as the specific details that are undermining the 1998 Act. They have expressed confidence to congressional leaders about their ability to put things back in order, and outfitters can only hope that these commitments have been made in good faith. It is the nature of the process that all parties remain somewhat unhappy with the results, but the need for a major overhaul of this particular set of documents is vast.

The men and women who are outfitters and guides provide a remarkable service to the public. They share unique skills and a rich heritage in backcountry with families that might otherwise never see the truly "wild side" of our National Parks. This experience cannot be replicated elsewhere. This is not an experience that can be replaced by ranger-led interpretive tours.

It is time for those in NPS who write the rules to acknowledge that most park visitors want to find these products and services available. Congress rewrote concessions policies in 1998 to assure that these products and services are provided in an affordable, responsible fashion. It is now time for concessioners to give good service under that new law. Outfitters and guides will do so with confidence and commitment, if the Final Rule is reasonable.

Thank you, Mr. Chairman, and members of the subcommittee for the opportunity to air our concerns prior to any final action on the part of the National Park Service. The Proposed Rule will require extensive revision to be brought into compliance with the law. It is therefore required by law that affected parties be given the opportunity for another round of public comment to the agency. I hope the subcommittee will join with us in assuring that this opportunity for additional comment on a revised Proposed Rule is forthcoming.

Comments of

America Outdoors

on

Proposed Rule Affecting Concession Contracts

National Park Service Concessions Management Improvement Act of 1998

(64 Fed. Reg. 35516 (June 30, 1999))

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I. General Purpose of the Act

The essence of the proposed rules fundamentally conflict with the express purpose of the Act. After years of debate through successive sessions and countless hearings, Congress enacted a bipartisan measure which contained an affirmative statement of the role of concessions in national parks. The Act states that "the Secretary shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." P.L. 105-391 § 403.

The phrase "shall utilize concessions contracts" is not a hollow or mild prescription to the National Park Service. This phrase reflects the clear appreciation by Congress of the positive role concessions have played and will continue to play in preserving the stunning natural beauty and environmental integrity of national parks while at the same time providing essential visitor services to meet the Organic Act's mandate of "providing for their enjoyment." National Park Service Organic Act of 1916, 16 U.S.C. §§ 431-433 (1994).

This appreciation is found in the refrain of individual legislators speaking on the House and Senate floor and the unanimity of opinion expressed in their respective committee reports. When Senator Thomas of Wyoming introduced the Act in the Senate, he asked his colleagues to remember the purpose of national parks: "To preserve the resource and provide a pleasant and quality visit. That is what these concessions do." 144 Cong. Rec. S1160 (daily ed. Feb. 27, 1998). Congressman Vento stated that concession operators "played an essential role" reflecting a "marriage of the private sector, of entrepreneurial interest with the parks, [that] has been a long-standing tradition in this Nation and has served us generally well." 144 Cong. Rec. H10687 (daily ed. Oct. 13, 1998). Congressman Hansen expressed a strong sentiment: "I hope we never diminish the role of the concessionaire in the parks." *Id*. at 10688.

Both the House and Senate committee reports provide an endorsement of outfitter and guide concessions in particular. The reports state:

With respect to outfitter and guide concessioners, it is important to encourage the continuity of concessioner operations because of the need to encourage the retention of the highly skilled guides needed to provide a safe and enjoyable experience to backcountry visitors in need of expert assistance.

Senate Comm. on Energy and Natural Resources, Vision 2020 National Parks Restoration Act, S. Rep. No. 105-202 at 32 (1998); House Comm. on Resources, National Parks Omnibus Management Act of 1998, H. Rep. No. 105-767 at 34 (1998).

The language of the statute itself and the words of Congress thus express an unambiguous and binding intent: *the National Park Service shall utilize and encourage concessions to play an essential role to protect park resources and provide for their enjoyment*.

In contrast to the express language of the Act and the clear intent of Congress, the proposed rules discourage concessions and throw unreasonable, and in many cases illegal, obstacles to the reasonable utilization of concessions. The proposed rules, whether by careful intention or not, form a regulatory scheme that is simply hostile to the mandate of Congress to establish an effective partnership with concessions in the context of reasonable competition and sound business practices. Thus, the proposed rules are legally deficient in several respects.

In the sections below, we identify specific shortcomings and also provide suggestions for addressing the shortcomings identified. Overall, however, the proposed rules are so deficient in several respects that the only practical course, and the legally required one, is for the Park Service to withdraw the present proposal and issue new proposed rules for further public review and comment.

II. Omissions From Proposed Rules

Before commenting on the issues which the proposed rules address, it is important to note the issues not addressed in the rulemaking. The proposed rules are inadequate in part because they fail to provide necessary guidance to the agency in implementing several key provisions of the Act.

A. Commercial use authorizations

The rulemaking provides no guidance for implementation of the commercial use authorizations provided for in section 418 of the Act. This authorization will be the most numerous type used by the agency. While the current count of concession contracts and permits is approximately 640, there are over 3,000 operations currently authorized under incidental business permits which may in the future qualify for commercial use authorizations. H. Rep. No. 105-767 at 21. With such large numbers, it is both necessary and appropriate to provide field personnel with some degree of useful guidance.

Both committee reports state Congress' intent that the agency use this authorization in appropriate circumstances:

The Committee considers that commercial operations that meet the criteria of this section may appropriately be authorized under the less restrictive controls and conditions applicable to concession contracts because of their limited scope and impacts. However, the Committee also expects that the Secretary, in administering commercial use authorizations, will exercise due caution to assure that the statutory criteria set forth above are adhered to and that operations that properly should be treated as concession operations are not permitted under the terms of a commercial use authorization.

S. Rep. No. 105-202 at 40; H. Rep. No. 105-767 at 44 (emphasis added).

The reports thus lead to two conclusions. First, Congress intended the agency to utilize commercial use authorizations under specified conditions. The conditions contain broad prescriptions which require rulemaking to constrain potentially unreasonable agency discretion. For example, the statute states that the agency shall "require that the provision of services . . . be accomplished in a manner consistent to the highest practicable degree with the preservation and conservation of park resources and values." Sec. 418(b)(2)(B). The mandate to "require" services that preserve conservation values to the "highest practicable degree" is a broad prescription that does not provide useful guidance to the field manager making a decision about a specific operation. The agency provided guidance in the proposed rules to implement the same broad prescription in the context of concession contracts, and it is therefore logical to provide similar guidance for commercial use authorizations.

Second, Congress intended the agency to "exercise due caution" to prevent abuse of this authorization. The lack of a rulemaking on this authorization does not meet the standard of "due caution." For example, the exemption of nonprofit institutions from the requirement to obtain commercial use authorizations seems to conflict with the statute's language limiting commercial use authorizations to (1) commercial operations with gross annual receipts of not more than $25,000, (2) the "incidental use" of resources of the park which provide services originating and terminating outside of the park, and (3) "organized children's camps, outdoor clubs and nonprofit institutions (including back country use)." Sec. 418(c).

The tension between the exemption of nonprofits and the intention to use commercial use authorizations for nonprofit institutions using backcountry is precisely the scenario which calls for rulemaking. There is no doubt that this language may lead to numerous arbitrary decisions in the vacuum of agency guidance. While many large nonprofit institutions operate responsibly by seeking appropriate permits for their use of public land, such as America Outdoors' member organizations Outward Bound, Wilderness Inquiry, and the National Outdoor Leadership School, there will be some that take advantage of the nonprofit loophole to operate in direct competition with both for-profit and nonprofit organizations offering outfitter and guide services. There is thus a potential for unregulated nonprofit use to displace regulated for-profit use. Only reasonable rules will provide necessary guidance to effectively implement the Act's commercial use authorization program.

Finally, the phrase "incidental use" lends itself to arbitrary interpretations. The phrase can apply to the method or amount of use, or to the frequency of trips. The circumstances of individual national parks will also create different interpretations of the phrase. For example, a heavily visited park may interpret the phrase differently than a remote, less visited park. Some degree of variance in the phrase's meaning may be appropriate, but it is important to understand that the on-the-ground effect of this limitation should be reasonable given the specific service and national park for which the commercial use authorization is utilized.

B. "Simplified procedures" for small concessions contracts

Section 403 of the Act requires "simplified procedures for small, individually-owned, concessions contracts," many of which might normally be expected to be contracts for outfitter and guide operations. The proposed rule does not address steps to be taken to simplify the process for such contracts. The proposed rule's extensive selection and award process, which itself exceeds the statutory direction for large concession contracts, simply does not meet the standard of a simplified procedure. By failing to address this significant and non-discretionary order of Congress, the proposed rules fail to provide small concessions a

right they are granted by the Act.

C. Reasonableness of rates

Another important area in which the proposed rule is silent appears in section 406 of the Act, "Reasonableness of Rates." The statute directs the new Advisory Board to recommend procedures with respect to ratemaking, including changes in existing rates. The board has been appointed recently, but it will take many months for approved procedures to result from its work as advisors to the Secretary of the Interior. In the meantime, concessioners face many decisions in purchasing and pricing in the next year to two years. No method exists under the Proposed Rule by which rates might be set or modified. The Proposed Rule will handicap concession operations by not providing, at the very least, an interim procedure for determining reasonable rates.

D. Contracting for services

Section 410 of the Act directs the Secretary of Interior, to the maximum extent practicable, to contract with private entities to conduct the following elements of the management of the Park Service concessions program suitable for non-federal fulfillment: (1) health and safety inspections; (2) quality control of concession operations and facilities; (3) strategic capital planning for concessions facilities; and (4) analysis of rates and charges to the public.

Once again, the agency has not taken any measures, nor provided any guidance in its proposed regulations, on implementing this important contracting provision of the statute. Still, it is likely that any such contracting of concessions program services could affect the cost of operations. America Outdoors' members need to know whether the costs of the contracting for such services will be carried by concessioners as a cost recovery feature of the overall fee structure. If so, a projection of such costs should be made available in any prospectus offering and reflected in the terms and conditions of a concessions contract.

America Outdoors also believes that the agency should take steps to ensure that the administrative relationship between outside contractors and concessioners does not seriously interrupt the important working relationship between concessioners and agency personnel in positions responsible for resource management, visitor services and concession management. Further, the Park Service should take steps to ensure that the provision of sensitive financial information to outside contractors is protected. America Outdoors requests that the confidentiality of information submitted to outside contractors be protected to the same extent, or higher, as information submitted to the Secretary.

Finally, the agency should include in the rules implementing the Act guidance on how this outsourcing contracting will take place and how possible adverse effects on concession contract holders will be minimized or prevented. Because this contracting for services is within the areas of recommendations that are to be developed by the Advisory Board established under section 409, the importance of quickly convening the board and receiving and acting upon those recommendations is highlighted by the serious concerns raised by the potential outsourcing of concession program management services by the Park Service.

E. Small Business Regulatory Enforcement Fairness Act

The "Supplemental Information" section of the *Federal Register* notice states that the proposed rule is not a "major rule" under the Small Business Regulatory Enforcement Fairness Act. 5 U.S.C. § 804(2). The agency

states that the primary effect of the proposed rule is to establish concession management policies and procedures. However, the agency admits that implementation of the proposed rule will result in a reduction from 630 current National Park Service concession contracts and permits, to as few as 350 concessioners. 64 Fed. Reg. 35518. This odd and unsupported intention to reduce concession contracts may extend to the possible reduction in commercial use authorizations that may also result from implementation of the proposed rule. America Outdoors believes that the net result is an impact on this industry of over $100 million annually with significant localized impacts on employment and the economies of small towns located near national parks. The agency must therefore reevaluate its compliance with the Small Business Regulatory Enforcement Fairness Act.

F. Regulatory Flexibility Act

The announcement of the reduction of concession contracts should also trigger compliance with the Regulatory Flexibility Act, but the agency merely announces that its initial analysis will be published in the *Federal Register* at some unspecified future date. This statement does not comply with the Regulatory Flexibility Act. 5 U.S.C. § 601-612. The Regulatory Flexibility Act requires an agency to publish an initial regulatory flexibility analysis at the time of publication of general notice of proposed rulemaking for the rule. *Id*. § 603(a). This analysis is not required if the head of the agency certifies that the rule, if promulgated, will not have a "significant impact on a substantial number of small entities." 5 U.S.C. § 605(b). Neither the analysis nor the certification is contained in the June 30, 1999 *Federal Register* notice. The Park Service should issue the initial regulatory flexibility analysis when it issues a new proposed rule for concession management.

III. Concessioner Selection Process

The Act requires the following factors as the primary criteria for evaluating and ranking responses to a prospectus:

(1) Responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources;

(2) Experience and related background of the operator;

(3) Financial capability of the operator; and

(4) The proposed franchise fee, except that consideration of revenue to the United States shall be subordinate to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates.

Sec. 403(5) (emphasis added).

The first three factors are essential in assuring the selection of qualified outfitters and guides who will provide consistently satisfactory service to the public. The agency has a legitimate obligation, as expressed in the fourth selection factor, to also consider a reasonable return to the treasury. A problem arises, however, when the agency attempts in the proposed rule to sidestep Congress and the law in order to elevate fee bidding above the three criteria specified in law as the primary determining factors.

A. Selection criteria

1. Fee bidding

Encouragement of fee bidding in proposed rule 51.21 violates the statute's clear language. The selection process established by the proposed rule contains several provisions by which the agency distorts the law by promoting fee bidding as the ultimately decisive factor in the award of concession contracts.

Proposed rule 51.21 begins by following the process established by the Act, in which a single proposal rises to the level of "best proposal" based upon evaluation of the first three superior criteria. It is the case that fees for many outfitters will be standardized, where multiple contracts exist (see section 411). Outfitters in other circumstances, however, will face largely unrestrained fee bidding under the selection system proposed.

The proposed rule adds considerable detail to the process described by law, appearing to almost purposely drive the selection process toward fee bidding. This complicated process invites deadlock in the ranking of bids by the three primary criteria. The proposed rule goes further to then create arbitrary "tie breakers" in a process that invariably leads to the selection of the "best proposal" based on who offered the highest fee.

For example, if two or more proposals are judged substantially equal with respect to the outfitters' experience and financial capability, the Act clearly requires that the "best offer" is the proposal with the best environmental enhancement program. The law discourages pure fee bidding by stating: "consideration of revenue to the United States shall be subordinate." Sec. 403(5)(iv). In direct conflict with this aspect of the Act, the proposed rule gives greater weight to a higher franchise fee by arbitrarily assigning superior status to the fee as a form of "environmental protection." The agency attempts to justify this by asserting that a higher franchise fee provides "substantially greater benefits for the preservation of the resources of the park area."

Thus, the agency equates fees with environmental protection and elevates (not subordinates) fee bidding. This suggests that, in the view of the agency, the potential stream of revenue from fees is more important than actual measures undertaken for the protection of park resources, as well as the quality of concession services provided to visitors. Not only does this selection scheme violate the express language of the statute, but it also unreasonably obscures the intent of Congress. In its discussion of this selection process and the selection criteria, the House committee stated:

Within the competitive selection process, it is the intent of the Committee that the Secretary, when reviewing the principle [sic] factors for selecting the best proposal, give substantial consideration and weight to the experience, background, and past performance of those submitting the proposal. The proven and acceptable experience and expertise the prospective concessioner exhibits in providing the goods or services to the public should be regarded as highly important to the selection of the best proposal.

H. Rep. No. 105-767 at 32.

The elevation of fee bidding as a superior factor, rather than simply a subordinate consideration as directed by the statute, clearly perverts the express language of the Act and must be withdrawn.

2. Substantially equal proposals

Proposed rule 51.23 creates a second round of bidding when the agency determines that two or more proposals are "substantially equal with respect to qualifying as the best proposal." Upon such a determination, the "substantially equal" proponents must submit a "best and final" proposal. Often several outfitters and guides will offer the same or similar services along a trail, river segment, or other resource

area in a park. Each service is usually, nonetheless, quite unique and responds to its own niche in a highly competitive market. As a result, it will be unusual for the agency to determine that two proponents will truly offer "substantially equal" proposals.

The concern is that without better guidance defining the use of selection criteria, such as the use of secondary factors contained in the prospectus, the agency will be tempted to find proposals substantially equal in order to create a second round of bidding in which the agency can extract more out of a proponent, including higher fees. Given the cost of responding to proposals - one America Outdoors member, for example, estimated that the cost to respond to a recent prospectus equaled 20 percent of his anticipated net revenue over the life of the five year permit - the agency should be discouraged from soliciting a second round of bidding.

3. "Greening"

The objective of promoting environmentally sensitive concessions is laudable. The statement contained in the "Supplementary Information" portion of the Federal Register notice, however, causes some concern. The notice states "[i]t is our intention to 'green' both government and concessioner operations in park areas so as to make them a nationwide model and example." 64 Fed. Reg. 35516. Outfitters and guides will certainly continue to strive to provide the best environmental protection, but the statement regarding setting a "nationwide model and example" implies a level of investment, innovation, and research that may outstrip the economic reality of small concessions and the ability to purchase affordable technology.

Unproven technology that has not been established in the marketplace, or experimental procedures that increase operating costs without assurance of the effectiveness of such procedures, should be considered optional features of any concession contract or other agreement. Testing new technology or procedures to provide a "model and example" is a worthwhile endeavor, but such a program should be carefully monitored to assure that the associated costs do not create an unreasonable burden on the concessioner's ability to focus staff and financial resources where they are most needed: safe and enjoyable services to the public.

B. Multiple contracts within a park

Section 411 of the Act creates a system for "comparable fee structures" among similar outfitting and guide services within a national park. This "multiple contracts" language is extremely important to outfitters, who are typically highly competitive in their markets, based upon the quality of services provided to visitors. The agency currently uses similar comparable fee structures in a generally fair and reasonable manner.

Proposed rule 51.90 identifies a few "relevant factors" that the Director may consider in establishing franchise fees under a comparable free structure. The rule, however, does not provide any specific guidance to determine whether contracts for the same or similar services are "comparable." This gap in the proposed rule should be addressed in a revised proposed rule.

America Outdoors is also concerned that the threat of modification of existing contracts (discussed in proposed rule 51.84) could lead to differentiation of some, or all, multiple contracts to the degree that "similar services" are then deemed to be "not comparable." Similarly, the Director is given unilateral authority to split or combine concession contracts, an action that may well be contrary to the best interests of the outfitter. Such actions would eliminate any right of preference earned by the outfitter, as well as subjecting outfitters in multiple contract situations to fee bidding.

IV. Preference in Renewal

No meaningful preference in renewal survives the proposed rules. Congress modified the "best proposal" process by providing a right of preference to encourage the continuity of outfitter and guide operations. This right of preference becomes meaningless if the agency adopts the Proposed Rule. Several provisions, without modification, remove any meaningful preferential right, and will directly affect the continuity of outfitter and guide services. The discussion below first addresses the definition of "outfitter and guide services" and is followed by an analysis of the mechanisms which govern the statutory right to a preference in renewal.

A. Outfitter and guide services

1. Scope of "outfitter and guide services"

To obtain the preference in renewal, a concession must meet the criteria specified in the Act. An operation must either be an outfitter and guide service, or it must have anticipated annual gross revenues under $500,000. Sec. 403(8).

The scope of "outfitter and guide services" is defined in proposed rules 51.34, 51.35, and 51.36. For the most part, the proposed rules track the language of section 403(8) which defines these services and provides a non-inclusive list of examples, including "concessioners which provide guided river running, hunting, fishing, horseback, camping, and mountaineering experiences."

The proposed rules, however, elevate an incidental aspect of many outfitter and guide operations into a loss of the preference for renewal. Proposed rule 51.37 states that a concessioner who "provided visitor services beyond the scope of the outfitter and guide services authorized" will lose the characterization of "outfitter and guide" and will therefore lose the right to preference in renewal. The only exception is the determination by the Director that the additional services "were negligible in nature."

While camping is the traditional mode of overnight accommodations for outfitted guests, there are many cases of outfitter and guide services within national parks where an overnight stay at a historic lodge is part of the itinerary. Similarly, a day or portion of a day in a multi-day tour may be spent viewing or participating in a park feature or museum that is not technically in the "backcountry." Providing this glimpse of popular destination features while dispersing the substantial portion of the use to remote areas for the remainder of the trip is a service outfitters provide that aids park visitor management. Rather than maximizing this opportunity to manage visitation and control crowding, the proposed rule appears to dwell on details that will eliminate preference for outfitters and guides to the greatest achievable extent. The proposed rule should provide guidance to the reasonable scope of which incidental services are "negligible in nature." This concern also applies to the potential for the agency to limit outfitter and guide classifications based on services provided outside of the park boundaries, such as small retail or campground operations. Clearly, the provision of ancillary services outside of the park should not concern the agency.

Furthermore, proposed rule 51.41 appears to unnecessarily burden the regulatory process by requiring the Director, or a Deputy or Associate Director, to determine whether a concession contract is or is not an outfitter and guide contract. It is inefficient to require senior policy staff to review such a large volume of prospectus offerings to determine whether individual prospectuses describe an outfitter and guide contract. The Act provides the necessary guidance for rules to be written that effectively allow field personnel to make these determinations. The Act does not require the Director or his associates to make such a

determination, and thus there is no compelling need to burden the Director. This rule is further evidence of a regulatory scheme intended to discourage, rather than encourage, responsible concession operations.

2. Definition of "backcountry"

In a similar approach to that used to define "outfitter and guide services," the agency proposes a definition of "backcountry" in rule 51.38 which unreasonably obscures common notions of what constitutes a park's backcountry. For example, the rule suggests that the unavailability of search and rescue is a factor in determining whether an area is or is not backcountry. For some outfitted guests, the backcountry begins ten feet from the parking lot if their health and safety depends on the skill and experience of the guide. This is also the case for outfitted trips serving special populations.

We suggest three revisions to this proposed rule. First, the statement regarding search and rescue should be deleted. Second, the rule should state, "The health and safety of park visitors is more readily assured by the supervision of experienced outfitter and guide services, regardless of the proximity to developed areas of a park." Finally, the role of outfitters in protecting park resources by supervising visitation and reducing impacts should be recognized by adding the statement: "The operations assist in dispersing visitors away from signature resources features and other areas of intense visitation."

B. Preference in renewal mechanisms

1. Satisfactory performance

Proposed rule 51.42 states that if a concession operator operates in a less than satisfactory manner for more than one year during the term of a contract, the operator will not be considered a "satisfactory concessioner." This provision is reasonable and promotes diligence to achieve acceptable performance standards.

This proposed rule also contains a "sudden death" provision that forbids a determination of overall satisfactory performance if the operator receives a less than satisfactory rating in either of the last two years of the contract. A single incident that might result in an annual rating that is less than satisfactory can undo as much as a decade of otherwise outstanding service to the public. The agency should eliminate operations which demonstrate patterns of unsatisfactory performance. The proposed rule instead is a landmine placed in the path of outfitters and guides who consistently fulfill the terms and conditions of their concession contract.

Proposed rule 51.43 addresses satisfactory ratings after assignment or transfer of a concession contract. After such an assignment or transfer, the new operator cannot receive a satisfactory rating if the assignment or transfer occurred within the last two years of the contract term. There is simply no relationship between assignment or transfer of a contract and contract performance, and therefore no rational basis upon which to base this proposed rule. In most cases, the same guides and staff are employed and performance standards are met. This rule therefore exceeds statutory authority by placing a restriction on satisfactory ratings that is not found, nor called for, in the statute.

2. Amendment of preferred offeror's proposal

The heart of a meaningful preference in renewal is found in the ability of the preferred offeror to retain the concession if the existing outfitter (or small business operator) matches another offer to fulfill the terms of

the prospectus. Proposed rule 51.51 takes this simple concept and turns it into yet another hostile hurdle to the exercise of this statutory right. The rule provides that a preferred offeror may amend its proposal to meet the "better terms and conditions of the best proposal." To exercise the preference, the amended proposal must be timely and at least equal the terms of the best proposal, and the Director must determine if the preferred offeror is a qualified person with respect to the new terms of the amended proposal.

This limitation on the preferential right to renewal vitiates the unambiguous language of the statute and Congress' intent. By requiring the preferred offeror to prove qualification under terms at least equal to those of the best proposal, the agency is requiring the preferred offeror to respond to terms, conditions and qualifications that may well be completely outside the scope of the prospectus. Nowhere in the statute or in the voice of Congress is found such a limitation on the preference in renewal.

The statute plainly states that a preference in renewal attaches to an outfitter and guide if two, and only two, conditions are met:

(ii) the Secretary determines that the concessioner has operated satisfactorily during the term of the contract (including any extension thereof); and

(iii) the concessioner has submitted a responsive proposal for a proposed new contract which satisfies the minimum requirements established by the Secretary pursuant to paragraph (4).

Sec. 403(8)(B).

An outfitter and guide retains a preferential right if they operate satisfactorily and they meet the minimum requirements of section 403 paragraph 4, which include the minimum acceptable franchise fee, ability to provide satisfactory service, and the protection of park resources. The preferred offeror must match a better offer within the context of terms and conditions for services within the scope of the prospectus. It is entirely unreasonable to require that a preferred offeror be "requalified" in the consideration of an otherwise responsive bid. Congress has spoken on this issue in unambiguous terms and the agency is forbidden to make a material alteration of the preferential scheme which defies the statute itself.

3. Appeal by the preferred offeror

Proposed rule 51.55 provides that a prior concessioner may appeal the Director's determination that the operator is not a preferred offeror. The prior concessioner has 30 days in which to appeal in writing to the Director. There is no reason for this appeal process to differ significantly from other appeal procedures in the Department of the Interior. Other appeal procedures allow submission of a *notice* of appeal within 30 days, and then an additional time period within which to file a statement of reasons. *See*, *e.g.*, 43 C.F.R. § 4.412 (Interior Board of land Appeals); 43 C.F.R. § 426.24(b) (Bureau of Reclamation). The notice/statement of reasons procedure adopted by Interior reflects the sound policy that 30 days is insufficient to effectively construct a reasoned appeal. Therefore, the agency should adopt appeal procedures that mirror other procedures within its own department.

Furthermore, this proposed rule is an additional example of an unnecessary burden placed on the Director, or his deputy and associate. The rule states that the Director, the Deputy Director, or an Associate Director must *personally* consider an appeal of a preferred offeror determination. If the Director or his associates are busy, the preferred offeror as well as competing concessioners may be unreasonably delayed in achieving an exhaustion of administrative remedies.

4. Modifying the terms of a new contract

Proposed rule 51.33 implements a portion of the Act that limits a "preferential right of renewal" for the continuation of the services provided by the outfitter under the prior contract. The proposed rule states that no preferential right exists if the new contract materially differs in nature and type from terms and conditions authorized under the prior contract. It is not clear "how much" modification results in a service that materially differs from the outfitter's prior operations. If this rule is read literally, any growth in a company, or any improvements that evolve naturally in meeting the expectations of guests, or new skills or programs (such as ongoing efforts in the industry to serve people with disabilities and other special populations), could be construed as a material alteration that eliminates the right of preference for renewal.

Likewise, no guidance is given regarding the agency's modification of the terms of the new prospectus. A modification that may be termed immaterial by the concessioner may be deemed material by the agency in order to remove the preferential right.

Finally, a finding that a new contract materially differs from the previous contract should be subject to appeal to determine the materiality of a modification.

5. New or additional services

Proposed rule 51.84 implements a portion of the Act that directs the agency not to grant a preferential right to any concessioner to provide new or additional services. The proposed rule defines "new or additional services" as "new or additional services." This circular definition does a great disservice to outfitters and other concessioners who make a real effort to respond to the shifting expectations of visitors and to utilize better methods of protecting park resources.

Congress, on the other hand, could not have expressed its intent more clearly with respect to "new or additional services." The House Committee Report stated:

Although preferential right of contract renewal shall not be granted to a concessioner providing new or additional services, this should not be construed to prohibit the Secretary from making minor modifications to a contract which are reasonable extensions of that existing contract. H. Rep. No. 105-767 at 35.

Rather than using a circular definition, the proposed rule should incorporate the intent of Congress by allowing reasonable modifications that do not rise to the level of wholly new or additional services.

Congress provided an example to guide the agency. The House Committee Report stated, "As an example, the Secretary should not be prohibited from granting a contract modification to a concessioner who is providing recreational boats to the public because of adding more boats or jet skis at that same facility." *Id*. It is important to note that the example includes both a modification of quantity and type, though also indicating that both modifications fall within the general category of recreational boats. The proposed rule does not allow this type of modification without loss of the preferential right and therefore fails to adequately implement the intent of Congress.

V. Transfers, Assignments, and Encumbrances

Section 408(b) of the Act provides "reasonable conditions" for the transfer of a concession contract upon sale of the business. These conditions are:

(1) the prospective purchaser must be qualified to satisfy the terms of the concessions contract;

(2) the transfer or sale will not have an adverse impact on park resources or services; and

(3) the terms of the sale or transfer will not reduce the concessioner's opportunity for a reasonable profit over the remaining term of the contract or adversely affect the services provided.

These conditions are not burdensome and reflect sound public policy. Congress addressed the sale of the concession and transfer of concession contracts in the Committee Reports of both the House and the Senate, stating:

The Committee considers it essential as a matter of good business practice that a concessioner be able to sell its concession contract or pledge its assets for appropriate purposes but that the public interest must also be considered in such transactions. The Committee believes that [this] section [of the statute] provides an appropriate balancing of these considerations.

H. Rep. No. 105-767 at 40; S. Rep. No. 105-202 at 37.

Both the intent of Congress and the Act establish a straightforward principle: Sales of concessions and a timely transfer of contracts are a good business practice tempered only by the three reasonable conditions of the Act.

The proposed rule, however, goes far beyond the effective language of the Act to make the transfer of contracts more burdensome, not less burdensome. The good business practice extolled by Congress is subverted into a scheme of roadblocks and requirements--none found in the text of the Act--that are nothing short of absurd.

Proposed rules 51.94, 51.95 and 51.96 establish a reasonable requirement (consistent with the Act) that the assignment or encumbrance of a concession contract, or the right to operate under such contract, requires the agency Director's prior written approval. The proposed rule does not, however, stop at this reasonable interpretation of the law. It goes further to intrude into day-to-day business operations in ways unheard of in modern business practices. The Director's prior written approval is required before "revenues generated by a concession contract" may be assigned or encumbered in any fashion.

One example will serve to illustrate the absurdity of this proposition: Business credit could not be used by a concession operator without prior written approval from the Director of the National Park Service because it would encumber revenues generated by the concession. As a practical matter, the agency is proposing to prohibit an operator from routinely using a line of credit at will; nor could the operator borrow at will from other responsible financial institutions, regardless whether the operator is viewed as credit worthy in the business world. It states the obvious to note that loans and other financial transactions are absolutely necessary to replace equipment, to bridge the off-season period when there is little or no cash flow, or for many other routine purposes. Nowhere in the Act does Congress give authority to the agency to intrude into financial affairs to this degree.

Second, proposed rule 51.105 states that an assignment or encumbrance will not be approved if the transaction could result in acquisition of the concession through foreclosure or other means by a person not qualified to perform the contract. Again, an absurdity results. This rule means that a concession operator cannot borrow money from a banker or any other lender who is not qualified to operate the concession.

Again, the Act provides no authority for the agency to take such an action, and this limitation defies good business practice.

Third, proposed rule 51.99 inserts the Director into routine business discussions by requiring the Director's prior written approval of a transaction before the transaction is completed. If this proposed rule is allowed to stand, all preliminary discussions between a concession operator and a potential buyer, a bank, a credit card company, or even an equipment supplier, will require written approval before each transaction is consummated. Again, the Act expressly allows for reasonable business practices to guide the sale and transfer of contracts and simply does not authorize this level of intrusion into day-to-day matters.

Fourth, the proposed rule fails to provide a reasonable time limit on the Director's review of a transfer or assignment. Elsewhere in the proposed rules, the new concessioner's first day of business under an assigned contract is the day the Director approves the assignment (proposed rule 51.43). An unreasonable delay could easily interfere with the good faith effort to assign a contract before the remaining two years of the contract to avoid the automatic (and unreasonable) loss of the preference in renewal.

Furthermore, proposed rules 51.102 and 51.103 "encourage" the use of a standard proforma (a statement reporting financial and accounting information). The "standard proforma" contains a gauge of financial health related to whether loans and amortized assets will be satisfied within the term of the contract. With contract terms generally awarded for ten years or less, few routine loans or amortization schedules will be performed within the term of the contract. Thus, the "standard proforma" does not correspond to standard business practices.

Finally, the penalty for not using the standard proforma which is "encouraged" by the agency is the possible disapproval of the transaction. Specifically, the proposed rule states that the "submission of a non-standard proforma or proformas is more likely to result in disapproval of a transaction by the Director." The Act provides no authority for either the use of a standard proforma or a penalty unrelated to the merits of the transaction.

Thus, the proposed rules addressing transfers, assignments and encumbrances establish a scheme of extensive regulation that is contrary to law because it does not allow for the sale or transfer of concession contracts with reasonable conditions. Indeed, the conditions imposed by the proposed rules are unreasonable, impractical in the extreme, and force bad business practices upon the concessioner. In short, the rules defy Congress' express intent to allow the "essential" business practices of the sale of a concession business or the pledge of assets for appropriate business purposes.

VI. Recordkeeping Requirements

America Outdoors recognizes that section 414 of the statute contains basic recordkeeping requirements, and that these statutory requirements are comparable to earlier requirements in the 1965 Concessions Policy Act. As both businesspeople and citizens recognizing the special obligation that comes with operating in America's national parks and other public lands, America Outdoors' members appreciate the need to disclose certain sensitive financial information to the National Park Service and to the Comptroller General's office for its audits of agency and concessioner activities. Among other things, the recordkeeping requirements help the agency perform its duty for the public and park visitors of ensuring the reasonableness of the rates charged by concessioners and the franchise fee paid to the government for the privilege of operating in the park system areas. *See National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 676 (D.C. Cir. 1976).

Where America Outdoors must part ways with the agency proposal, and object strenuously to the proposed regulation, is in the agency's cavalier approach of requiring detailed financial information while at the same time pledging to make full public disclosure of this sensitive business information. The agency fails even to acknowledge the individualized inquiry required under applicable law before such confidential business information may be released to the general public, including the direct business competitors (or those wishing to supplant concession contract holders) of America Outdoors members affected by this regulation.

Under proposed rule 51.113, the Park Service indicates it will make publicly available the following sensitive business information that it will require each concession contract holder to submit annually: gross receipts (broken out by department), net income or loss before taxes, franchise fees and building use fees, merchandise inventories, and depreciable fixed assets and net depreciable fixed assets (broken out by leaseholder surrender interest or possessory interest, as applicable, and personal property). Moreover, the Director will make further, other sensitive business information publicly available "to the extent permitted by law."

There are several serious problems with the proposed approach. First, the Park Service fails to identify what is the "applicable law" that may guide its determination as to what additional sensitive business information, other than specified in rule 51.113, it will seek to disclose to the general public. Second, perhaps because it fails to identify or even inquire into what the applicable law is, the Park Service overlooks the controlling legal framework that supports nondisclosure of both the specific information identified in rule 51.113 and the additional information alluded to whenever the disclosure of such information would be likely to either: (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *NPCA v. Kleppe*, 547 F.2d at 677-78.

Under the *NPCA v. Kleppe* decision, which is still controlling law, *see Niagra Mohawk Power Co. v. U.S. Dep't of Energy*, 169 F.3d 16, 17 (D.C. Cir. 1999), the Park Service should not routinely disclose the type of sensitive, indeed confidential, business information that it purports is releaseable under proposed rule 51.113. In *NPCA*, the D.C. Circuit specifically held that confidential concessioner business information, including exactly the type of information identified in rule 51.113--such as profit and loss statements, inventories, and capital expenditures information--was exempt from public disclosure under exemption 4 of the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Moreover, the *NPCA* decision emphasizes the need for an individualized determination as to whether the information required to be submitted to the government for statutory compliance purposes may then simply be turnkeyed by the government and released to the general public.

Significantly, of the seven named concession operations at issue in *NPCA*, the court held that for five of those operations the confidential business information solicited by the government was *not* then releaseable to the general public. Doing so was likely to cause substantial harm to the competitive position of the concessioner from whom the information was obtained. 547 F.2d at 682, 687. In so holding, the court recognized that even though certain concessioners may operate as the only entity providing their specific services in a park unit, day-to-day competition may still be present from businesses in surrounding geographic areas (such as gateway communities).

The agency's proposed rule 51.113 entirely overlooks these important FOIA considerations, policy, and controlling law. This is especially troublesome where the *NPCA* decision recognizes that the FOIA as a whole seeks to balance the policies of public disclosure with the protection of private rights, including

confidential business information of exactly the type that rule 51.113 proposes to routinely disclose. *See NPCA*, 547 F.2d at 678.

To address this oversight in the proposed rule, the agency should revise the rule to clarify that it will, first, only make the identified information publicly available upon appropriate and proper request from a member of the public. Second, the proposed rule should, prior to public disclosure, provide an opportunity for the concessioner who submitted the information to make a showing that disclosure of the confidential business information would likely cause substantial harm to its competitive position, thus justifying the non-disclosure of the information by the Park Service or the Comptroller General. *See* 43 C.F.R. § 2.15(d) (Department of Interior FOIA regulation specifying that if "a request seeks a record containing trade secrets or financial information submitted by a person outside of the Federal government, the bureau processing the request *shall* provide the submitter [i.e., the concessioner here] with notice of the request whenever--(i) [t]he submitter has made a good faith designation of the information as commercially or financially sensitive, or (ii) [t]he bureau has reason to believe that disclosure of the information may result in commercial or financial injury to the submitter.") (emphasis added).

Third, these same protections should apply to the proposed rule that the agency will make "other information" publicly available "to the extent permitted by law." In revising this rule, the Director should also clearly delineate in this regulation and by cross-reference to the appropriate FOIA statutory and regulatory provisions what the applicable law is and how it will be applied to determine whether concessioner-submitted confidential business information is indeed releaseable or not to members of the public upon proper request.

VII. National Park Service Concessions Management Advisory Board

An important part of the statute was Congress' establishment of the National Park Service Concessions Management Advisory Board in section 409. The board was charged under the statute with several important functions, including providing advice on reasonable concession rates and franchise fees. *See also* § 409(c). The agency is to implement the recommendations developed by the Advisory Board within six months after receiving those recommendations.

The Advisory Board was specifically created to address congressional concerns (shared by those in the outfitting and guide industry) that Park Service concessions management policies and practices had become too bureaucratic in certain respects and did not reflect contemporary business practices. S. Rep. No. 105-202 at 38 (1998). America Outdoors urges the agency to publish the findings and recommendations of the board as soon as possible, and--especially as regards the rate structure and changes--to circulate those board recommendations as a further proposed rule for public comment and adoption, consistent with Congress' direction on these matters.

VIII. Transition from Old Statute to New Statute

Section 415 of the Act addresses the repeal of the 1965 Concessions Policy Act and the integration of contracts and permits under that Act with the programs of the current Act. America Outdoors is concerned, however, that in developing proposed regulations for this transition, the agency has impermissibly shifted the burden of proof from the Park Service to individual concessioners to show that their contract or permit incorporated a preference right of renewal pursuant to the 1965 Act.

Proposed rules 51.115 and 51.116 incongruously now read that the statutory right of preference renewal

enjoyed by certain concessioners under the 1965 Act was not incorporated as a contract or permit right into the contracts or permits of those concessioners. The Park Service's proposed rules are inconsistent with the basic legal notion that where a particular agreement is governed by the terms of a statute--as were the permits or contracts issued under the 1965 Act--then the permit or contract itself must be construed to encompass the terms of the statute, even if those terms, such as the right of preference renewal, are not specifically reiterated in the permit or contract itself.

As the United States Supreme Court has stated:

"Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge."

Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 130 (1991) (quoting *Farmers and Merchants Bank v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660 (1923)). Other courts have also succinctly stated the principle. *2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247,1254 (2d Cir. 1991) ("Laws and statute in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein."); *In re Camelot Assocs. Ltd. Partnership*, 102 B.R. 161, 166 (Bankr. D. Minn. 1989) ("The law governing the subject matter of a contract that is in effect as of the execution of the contract is deemed to be a part of the contract itself."). The agency now seeks by regulation to undo this settled legal rule, but that is not an area of the law that is within the Director's rulemaking authority to alter.

To correct this situation, the Park Service must revise these rules to provide that continuing permits or contracts issued under the 1965 Act incorporate a preference right of renewal so long as the contract's or permit's provisions would have included such a right under the 1965 Act. This approach would both be consistent with the applicable legal framework, and would remove the need for the awkward regulations in the proposed rules providing that a party who believes it is entitled to a preference right of renewal would first have to appeal to the director in an attempt to establish the preference right to which it is already entitled. The absurd result proposed by the draft rules would require every concessioner that believes it is entitled to a preference right of renewal under the 1965 Act to appeal to the Director to establish a right of renewal already granted to those parties as part of their currently-held contracts or permits under the 1965 Act.

Nonetheless, America Outdoors recognizes the need to transition from the old statutory framework to the current one. Therefore, America Outdoors proposes that the revised regulatory framework suggested above would, as in the agency's proposed rules, apply only to the award of the first concession contract that replaces a 1965 Act concession contract. The new contract itself would be issued under the 1998 Act and subject to that Act's requirements and programs for preference renewal.

IX. Proposed Standard Contract Language

The Park Service published a proposed revision of the standard concession contract in the *Federal Register* on September 3, 1999. 64 Fed. Reg. 48420 (1999). The agency states that it is not legally required to seek public comments, but that it chose to do so to assist it in development of a final version of the contract language. Nonetheless, where the proposed contract language creates an affirmative obligation not present in the Act or the proposed rules, the discretionary call for public comment should become mandatory.

When America Outdoors sought an extension of the public comment deadline regarding the proposed rules, a reason for the request addressed the need to see the proposed standard contract language in order to evaluate the interaction of the rules and the contract. The agency granted the extension, but the publication of the standard contract language failed to provide the necessary information to evaluate the standard contract.

The standard contract as published is not the contract which will apply to non-possessory interest concessions, such as all outfitters and guides. The agency stated:

NPS, after adoption of the new regulations and the new standard contract, also intends to develop and adopt a "short-form" concession contract that will be used for smaller concession operations that do not involve the concessioner obtaining a compensable interest in real property located on park area lands.

64 Fed. Reg. 48421.

America Outdoors is greatly concerned that the agency apparently plans no public comment on the actual contract which will apply to outfitters and guides. There is reason to believe the "short-form" contract will contain substantive obligations not contained in the Act or the rules. The proposed standard "long-form" contract contains questionable requirements that require public scrutiny, such as the review of educational content by the Director (sec. 7(b)) and quarterly reports related to environmental matters (sec. 15(b)). Both requirements signal a lack of understanding of outfitter and guide operations. For example, will the Director review the content of information received by guests over the course of a week-long or month-long trip? Such review, if possible, would entail tomes of information. Likewise, the quarterly report seems unduly burdensome to small outfitter and guide operations, especially when their season rarely extends year round.

X. Necessary and Appropriate Clause

The proposed rules miss an opportunity to correct a situation that is an historical and current source of arbitrary decision-making. The Act states that services in national parks shall be limited to those that are "necessary and appropriate" for public use and enjoyment. This is the same language used in the concessions policy statute of 1965. Since 1965, a number of concession managers in the agency have chosen to use this language to unreasonably deny access for, or entirely eliminate, outfitted activities. In other words, this language has a direct on-the-ground effect, but concession managers are given no guidance in applying the test of "necessary and appropriate."

It would be a great disservice to both outfitters and concessions managers if the agency fails to take this opportunity to clearly define in the regulations the concept and provide guidelines to the field. At the least, the regulations, and the Park Service, should acknowledge the application of the "necessary and appropriate" language by the federal courts in the review of Park Service concession policy decisions. Those decisions make clear that the "necessary and appropriate" language should not be applied by the agency in a manner that gives it unfettered, unreviewable discretion either to choose among competing concession applicants or to determine which visitor accommodations and services satisfy this statutory standard.

Instead, the case law makes clear that the agency's concessioner selection decisions are subject to judicial review and must follow the proper procedural and substantive requirements, or those decisions will be set aside by a reviewing court. Similarly, the agency's selection of which activities or accommodations are "necessary and appropriate" must be a park visitor/experiential based inquiry. *See*, *e.g.*, *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1253 (9th Cir. 1979) (NPS is obligated to protect the interests of park

visitors who may lack the skills, experience, or equipment to safely and enjoyably visit undeveloped park areas) (Grand Canyon National Park, Colorado River floater allocation case construing "necessary and appropriate" language). The language of the statute confirms this visitor-oriented focus of the "necessary and appropriate" inquiry. Under section 402 of the Act, Congress declared its policy of developing public accommodations, facilities, and services within park units by focusing on those accommodations, facilities, and services that "are necessary and appropriate *for public use and enjoyment of the unit of the National Park System in which they are located.*" Sec. 402(b)(1) (emphasis added).

As to concessioner selection procedures, the courts have not hesitated to set aside those Park Service decisions that deviated from the requirements for concessioner selection, especially those that are designed to ensure an even playing field for concessioner applicants and to protect the legitimate investments and past service of those applicants entitled to a preferential right of contract renewal. *See*, *e.g.*, *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir. 1977). The purposes of the "necessary and appropriate" language include both the encouragement of private concessioner activities and investment to secure visitor services for the park units, and the accommodation of the needs and wants of park visitors. Thus, a concessioner's (or potential concessioner's) economic interests as well as esthetic preservation interests (both historical and environmental) are within the zone of interests protected by the "necessary and appropriate" statutory language. *See Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981).

In sum, Park Service decisions under the "necessary and appropriate" language are reviewable, and a reviewing court will ascertain whether the agency considered the relevant factors and articulated a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made, in its decision.

Rather than being used as a shield to protect undocumented or arbitrary park manager selection procedures or determinations of appropriate concessioner services or content, these regulations should identify for both park managers and the regulated industry more precisely what the relevant factors are that the agency will consider in making determinations under the "necessary and appropriate" standard, and how those factors will be applied. The regulations should also clarify that, consistent with the judicial construction of this language (which Congress was aware of when it explicitly reincorporated the "necessary and appropriate" language from the 1965 Concessions Policy Act, *see*, *e.g.*, S. Rep. No. 105-202 at 29 (1998)), the "necessary and appropriate" determination is to be a visitor/experiential based inquiry that protects both the economic interests of concessioners and applicants as well as conservation and esthetic interests.

Conclusion

The proposed rule is legally inadequate and fails to effectively implement the National Park Service Concessions Management Improvement Act of 1998. The National Park Service should withdraw the proposed rule and issue a new proposed rule for public comment. The new proposed rule should address the deficiencies and omissions noted in these comments.